Notes

Private Facts Tort: The End Is Here

I. INTRODUCTION

On October 20, 1983, a woman told the Duval County, Florida, Sheriff's Department that an unidentified man robbed and sexually assaulted her.[1] In writing its report on the incident, the Sheriff's Department used the woman's full name, thereby making her identity part of a public record.[2] Relying on that record, the local *Florida Star* newspaper published a story on the incident with her full name, thereby violating a Florida statute that made publishing a rape victim's name in the mass media unlawful.[3]

The victim successfully held the newspaper civilly liable in the state courts.[4] Before the United States Supreme Court, however, the newspaper prevailed, another victor in the Court's continued propensity to place first amendment interests of the media before privacy concerns of the individual.[5] In holding for the newspaper, the Court also may have killed off the tort for truthful publication of private facts,[6] a vague cause of action whose application has spawned a confusing array of standards[7] under which challenges to the media seem doomed to fail.[8]

The *Florida Star* case dramatizes the tension between the privacy protections accorded individuals through state statute and common law doctrine and the rights of a free press encompassed in the first amendment.[9] While the Supreme Court addressed the subject numerous times in recent years,[10] the Court never resolved the tension with explicit doctrine. Even using rather unclear standards, though, the Court tipped the balance heavily in favor of the media by

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1. Florida Star v. B.J.F., 109 S. Ct. 2603, 2605 (1989).

2. *Id.*

3. *Id.*

4. *Id.* at 2606.

5. *See infra* notes 44-90 and accompanying text.

6. *See infra* notes 23-42 and accompanying text.

7. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 293 (1983). The author states, "The confusion that has attended the effort to create a firm legal contour for the tort merely reflects the inherent difficulty under the first amendment of treating truthful speech as tortious." *Id. See* Kalven, *Privacy in Tort Law - Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 330 (1966); Comment, *Privacy, Defamation, and the First Amendment: The Implications of Time, Inc. v. Hill*, 67 COLUM. L. REV. 926, 940 (1967).

8. *See infra* notes 91-93 and accompanying text.

9. The first amendment states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

10. *See infra* notes 56-90 and accompanying text.

consistently relying on an underlying notion that only an unfettered press can create the free flow of information essential to our form of government.[11]

Measured against that notion, the privacy interests in this tort will likely always be found wanting.[12] Indeed, the media prevailed so resoundingly before the Supreme Court in recent years[13] that this privacy cause of action, sometimes called the right to be let alone,[14] was considered somewhat an endangered species.[15] In the *Florida Star* case, the Court once again avoided setting any broad standard by which courts and the media could operate.[16] Without that standard, the Court once again applied a series of unsatisfying precedents[17] and once again held for the media, refusing to find their exercise of publishing truthful facts as an activity that a state may constitutionally proscribe. In doing so, however, the Court all but pronounced that species of tort extinct.[18]

In examining how this particular tort has been driven to near extinction, this Note will explore the historical development of the conflict between privacy and first amendment interests.[19] This Note will discuss how the Court applied those precedents to the *Florida Star* case and further expanded the media bulwark against future privacy actions.[20] Further, this Note will suggest what little remains in the way of private fact tort action, why current distaste for the media should not confuse critics into thinking this tort could be useful, and thus why this tort should not be missed.[21]

II. HISTORICAL DEVELOPMENT

A. *Right to Privacy*

The concept of individual privacy[22] arose only a century ago, in the famous law journal article of Samuel D. Warren and Louis D. Brandeis (later United States Supreme Court justice).[23] Concerned over press revelations about the

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11. In each case, the Court emphasized the narrowness of its finding, limiting the application of its decision to the discrete facts before the Court at the time. *See infra* notes 56-90 and accompanying text.

12. Some commentators believe this tort could never coexist with the first amendment. *See, e.g.*, Zimmerman, *supra* note 7, at 293. Zimmerman suggests that even the most enthusiastic advocates of a right to privacy, including Warren and Brandeis, recognized that an absolute protection "would intolerably hamper human discourse." *Id. See also* Zuckman, *Invasion of Privacy—Some Communicative Torts Whose Time Has Gone*, 47 WASH. & LEE L. REV. 253, 259-61 (1990). Zuckman calls the private facts tort "ill-conceived" because it attempts to protect individual interests that are insubstantial while creating dangers to freedom of expression.

13. *See infra* notes 109-10 and accompanying text.

14. *See, e.g.*, Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

15. Zimmerman, *supra* note 7, at 293-94, 362. *See also* Note, *Privacy and the Press: A Necessary Tension*, 18 LOY. L.A.L. REV. 949, 952 (1985) (privacy tort law in state of limbo).

16. Florida Star v. B.J.F., 109 S. Ct. at 2608-09. *See* Note, Florida Star v. B.J.F.*: Can the State Regulate the Press in the Interest of Protecting the Privacy of Rape Victims*, 41 MERCER L. REV. 1061, 1096 (1990).

17. *Id.* at 2608-13.

18. *See infra* note 138 and accompanying text.

19. *See infra* notes 22-90 and accompanying text.

20. *See infra* notes 94-142 and accompanying text.

21. *See infra* notes 137-47 and accompanying text.

22. *See infra* note 48 and accompanying text.

23. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). The article is considered perhaps the outstanding illustration of the influence of legal periodicals on the courts. *See* W. KEETON, PROSSER & KEETON ON THE LAW OF TORTS § 117, at 849 (5th ed. 1984).

Boston social scene,[24] they proposed a right not to have information about an individual's personal life exposed to the general public through the press.[25] While their proposal for a private facts tort gained recognition slowly,[26] it developed into one of the four distinct categories contained in the tort for invasion of privacy, identified by Dean Prosser[27] and adopted by the Restatement (Second) of Torts.[28] Eventually, whether by common law or statute, nearly every state adopted some form of the private facts tort.[29]

The tort contains three basic elements: (1) giving publicity to facts, (2) that a reasonable person would consider private and highly offensive if exposed, and (3) that are not of legitimate public concern.[30] Thus, a plaintiff must show that the information was private[31] and that the defendant disseminated the information widely.[32] The latter implicates the mass media but leaves individual gossips immune from liability for disseminating private facts.[33] This exemption for individuals stems from practical considerations, that is, the difficulty in attempting to restrict such individualistic yet widespread behavior as gossiping.[34]

The defendant media in a private facts case may defeat the action by showing that the public had a legitimate interest in the disclosed facts.[35] In other words, the courts ask, "Are the facts newsworthy?" This defense has evolved into an exception to tort liability for "matters of public concern."[36] Al-

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24. *See* Kalven, *supra* note 7, at 329.

25. Warren & Brandeis, *supra* note 23, at 195-96. "The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery." *Id.* at 196. *Cf.* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-1, at 1302 (2d ed. 1988) (privacy is "nothing less than society's limiting principle").

26. The first appellate state court to consider such a claim after the Warren-Brandeis article rejected the notion. Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902). The court denied the claim "that a man has a right to pass through this world . . . without having his picture published, his business enterprises discussed . . . or his eccentricities commented upon . . . ." *Id.* at 544, 64 N.E. at 443.

27. *See generally* Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960).

28. In addition to the category for the embarrassing publication of private facts, the categories are: intrusion on an individual's seclusion or solitude, publicity that places the individual in a false light, and appropriation of an individual's name or likeness. RESTATEMENT (SECOND) OF TORTS §§ 652A-52E (1977) (publication of private facts is § 652D). *See* Prosser, *supra* note 27, at 389.

29. S. METCALF, RIGHTS AND LIABILITIES OF PUBLISHERS, BROADCASTERS & REPORTERS § 2.03, at 2-11 to 2-16 (1984). *See* Zimmerman, *supra* note 7, at 365-66 (citing 36 states that have recognized the private facts tort). Some states have refused to recognize the tort. They include New York, Nebraska, Utah, and most recently North Carolina. *See* Note, Hall v. Post: *North Carolina Rejects Claim of Invasion of Privacy by Truthful Publication of Embarrassing Facts*, 67 N.C.L. REV. 1474, 1487 (1989).

30. RESTATEMENT (SECOND) OF TORTS § 652D (1977).

31. *Id.* at comment b.

32. *Id.* at comment a.

33. The existence of the mass publication requirement immediately taints the tort. Zimmerman, *supra* note 7, at 301. The requirement suggests that in this area the press has significantly less freedom of speech than does the private individual. *Id.*

34. Zimmerman, *supra* note 7, at 337. One court has said that abandoning the publication requirement would expand the concept of invasion of privacy beyond manageable limits. LaFontaine v. Family Drug Stores, Inc., 33 Conn. Supp. 66, 73, 360 A.2d 899, 902 (Conn. C.P. 1976).

35. RESTATEMENT (SECOND) OF TORTS § 652D comment d (1977). *See* Zimmerman, *supra* note 7, at 299-300.

36. The two concepts are often used interchangeably in discussing a defendant member of the media's defense to publishing a private fact. In Virgil v. Time, Inc., 527 F.2d 1122 (9th Cir. 1975), *cert. denied*, 425 U.S. 998, the court held that publishing private facts is not protected by the first amendment, absent the privilege of newsworthiness. *Id.* at 1128. *See* Note, *supra* note 15, at 959-61.

though the courts have not simply accepted the editorial judgment of the media as the determinator of newsworthiness, the vast majority of cases deferred to the media on publication decisions by holding that what is printed is by definition of legitimate public interest.[37]

Using this reasoning, the courts virtually assure the preeminence of the media in a private facts dispute.[38] Most jurisdictions that recognize the private facts tort allow the newsworthiness defense, perhaps because of the potential first amendment problems in allowing someone other than the media to determine what gets published.[39] Even the Restatement notes that it has not been established with certainty that liability in this tort is consistent with the free speech and free press provisions of the first amendment.[40] Numerous commentators have pointed critically to the tort's elements, and even its basic concept, as simply too vague to be pitted against a constitutional right.[41] Amid these constitutional concerns, the courts' efforts to mold standards for adjudication, then, often create more questions than provide satisfying answers.[42]

B. *First Amendment Interests*

Generally, the first amendment rights of free speech and a free press are viewed as guarantors of an uninhibited marketplace of ideas in which truth will ultimately prevail[43] and self-government thrive.[44] The Supreme Court first discussed the concept in a 1936 case[45] in which the Court stated that the first amendment was intended to protect "such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens."[46] This broad concept creates the single, common thread running through the Supreme Court decisions balancing first amendment concerns and individual privacy interests.[47]

The privacy interests at stake here, dealing with governance of the conduct of others who intrude on one's life, should be distinguished from privacy rights that immunize an individual's actions from government interference (such as

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37. *See* Zimmerman, *supra* note 7, at 353 n.320 (also pointing out that some scholars view this result as inevitable).

38. *See* Kalven, *supra* note 7, at 337 (suggesting that the newsworthiness defense obliterates the private facts tort).

39. *See* Zimmerman, *supra* note 7, at 300 n.34.

40. RESTATEMENT (SECOND) OF TORTS § 652D special note (1977).

41. *See, e.g.*, Zimmerman, *supra* note 7; Kalven, *supra* note 7; Comment, *supra* note 7; Zuckman, *supra* note 12. *See supra* notes 22-40 and accompanying text.

42. Zuckman, *supra* note 12 at 262-63.

43. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

44. *See generally* A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).

45. Grosjean v. American Press Co., 297 U.S. 233 (1936).

46. *Id.* at 250 (quoting 2 T. COOLEY, COOLEY'S CONSTITUTIONAL LIMITATIONS 886 (8th ed. 1927)).

47. The Court has said, "Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press." Time, Inc. v. Hill, 385 U.S. 374, 388 (1967). This case contains language that reflects the importance that public disclosure be "of public interest" to receive first amendment protection: "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Id. See* Katz, *Unauthorized Biographies and Other "Books of Revelations": A Celebrity's Legal Recourse to a Truthful Public Disclosure*, 36 UCLA L. REV. 815, 827 (1989).

use of contraceptives or aborting pregnancies).[48] In addition, these publication rights should be distinguished from the companion area of the publication of falsehoods, libel and defamation. That area, in which individuals aggrieved by the dissemination of damaging untruths seek redress, is well charted when compared to the area of truthful publication of private facts.[49] The areas differ fundamentally in two ways. First, the Supreme Court has held that false speech can be regulated by the states because it has no constitutional value.[50] The Court reasoned that such speech does not contribute to the free flow of information in public debate.[51] While false speech is considered constitutionally valueless, accurate speech deserves protection from state laws restricting its free exchange.[52] Second, injury caused by false or defamatory publication can be mitigated to a certain extent by subsequent publication, while injury caused by truthful publication cannot.[53] Truth, then, offers a complete defense in the line of cases involving libel.[54]

Against the backdrop of the first amendment, the Supreme Court has fashioned evaluative standards of sorts for truthful publication of private facts from four primary cases.[55]

1. Cox Broadcasting

The first private facts case to focus on the first amendment rather than state law aspects of the dispute was *Cox Broadcasting Corp. v. Cohn*.[56] In *Cox*, the father of a deceased rape victim filed suit against an Atlanta television station that obtained his daughter's name from a court record and broadcast her name on a news program.[57] The Supreme Court held unconstitutional a Georgia

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48. Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 740 (1989).

49. *See, e.g.*, Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Philadelphia Newspapers, Inc. V. Hepps, 475 U.S. 767 (1986); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985); Herbert v. Lando, 441 U.S. 153 (1979); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Rosenbloom v. Metromedia, Inc. 403 U.S. 29 (1971); Time, Inc. v. Hill, 385 U.S. 374 (1967); Rosenblatt v. Baer, 383 U.S. 75 (1966); Henry v. Collins, 380 U.S. 356 (1965); Garrison v. Louisiana, 379 U.S. 64 (1964); New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

50. *See* Zimmerman, *supra* note 7, at 312 (citing *Sullivan*, 376 U.S. at 279).

51. *See id.* at 313.

52. *See id.* The author suggests the Court has also made clear that to promote widespread circulation of ideas and truthful information the Court will provide some "breathing space for accurate speech by extending protection for some falsehoods." *Id.* (citing *Sullivan*, 376 U.S. at 272).

53. *See, e.g.*, W. HOPKINS, ACTUAL MALICE: TWENTY-FIVE YEARS AFTER *Times v. Sullivan* 10 (1989); M. NIMMER, NIMMER ON FREEDOM OF SPEECH § 1.02[G], at 1-42 (1984); Note, *The Imposition of Strict Civil Liability on a Media Defendant for Publication of Truthful, Lawfully Obtained Information*, 18 STETSON L. REV 119, 130 (1988).

54. *Sullivan*, 376 U.S. at 254.

55. The first apparent case of the victim of a sexual attack brought against a communications medium for invasion of privacy occurred less than 30 years ago. Hubbard v. Journal Publishing Co., 69 N.M. 473, 368 P.2d 147 (1962). *See* Franklin, *A Constitutional Problem in Privacy Protection: Legal Inhibitions on Reporting of Fact*, 16 STAN. L. REV. 107, 108 (1963).

In Time, Inc. v. Hill, 385 U.S. 374 (1967), the Supreme Court noted that it would not foreclose an interpretation of the New York statute to allow damages where the revelations published outraged the community's notions of decency. *Id.* at 383 n.7. "This case presents no questions whether truthful publication of such matter could be constitutionally proscribed," the Court said. *Id.*

56. 420 U.S. 469 (1975). *See* Note, *supra* note 15, at 951 n.20.

57. *Cox*, 420 U.S. at 472-74.

statute prohibiting the publication of a rape victim's name. In reaching that decision, the Court focused on two factors: the source of the information and the potential chilling effect of restricting the publication of truthful information.[58] Because the state allowed the court records to be public, the Court reasoned, it could not prohibit the media from publishing that information[59] and jeopardize the strong public interest in knowing about governmental operations.[60] While the public interest in government operations relates to newsworthiness, the Court did not specify "newsworthiness" as a defense.[61] The Court noted the important role the media plays in ensuring fair trials[62] and concluded that privacy interests should be protected by means that avoid public documentation or other disclosure of private information, not by restricting the media.[63] Thus, the Court immunized the press from liability for accurate reports about information contained in judicial records.[64]

The second justification for denying liability was the fear of a chilling effect upon the media in its pursuit of information.[65] The Court stated that a rule making public records available to the media but forbidding their publication if they offend the sensibilities of a reasonable person "would invite timidity and self-censorship and very likely lead to the suppression of many items that would otherwise be published and that should be made available to the public."[66]

While finding the state's restriction on the media unconstitutional, the Court cautiously limited its holding to the particular facts presented.[67] Because the interests of privacy and those of the free press are both rooted in traditions and significant concerns of society, the Court reasoned, it is not appropriate to address questions broader than those presented.[68] The Court left unanswered whether the media could ever be held liable for publishing truthful private facts and whether the media's protection extended beyond public judicial records.

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58. *Id.* at 496.

59. *Id.* at 487-97. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW § 16.36, at 940 (2d ed. 1983).

60. Linder, *When Names Are Not News, They're Negligence: Media Liability for Personal Injuries Resulting from the Publication of Accurate Information*, 52 UMKC L. REV. 421, 428 (1984).

61. *See supra* notes 35-37 and accompanying text.

62. *Cox*, 420 U.S. at 492. *See also* Note, *A Constitutional Right of Access to Pretrial Documents: A Missed Opportunity in* Reporters Committee on Freedom of the Press, 62 IND. L.J. 735 (1986-87) (public policy concerns give great weight to finding the existence of a constitutional right of access to documents used in all judicial proceedings).

63. *Cox*, 420 U.S. at 496. The Court stated, "If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information. Their political institutions must weigh the interests in privacy with the interests of the public to know and of the press to publish." *Id.* Ironically, in his dissent in the *Florida Star* case, Justice White contends that, when the State of Florida attempted to do exactly what the Court suggested here in *Cox*, the state's statute was overturned. *Florida Star*, 109 S. Ct. at 2616 (White, J., dissenting).

64. *Cox*, 420 U.S. at 491.

65. *Id.* at 496.

66. *Id.*

67. *Id.* at 491.

68. *Id.* The Fifth Circuit analyzed the situation similarly in a private facts case, saying, "Our constitutional warrant authorizes us to decide only those 'cases and controversies' actually before us. Nowhere is the wisdom of that restriction more apparent than in cases like the present one, which poses a conflict between two fundamental aspects of individual liberty . . . ." Ross v. Midwest Communications, Inc., 870 F.2d 271, 275 (5th Cir. 1989).

2. Landmark Communications

In the next major case,[69] *Landmark Communications, Inc. v. Virginia*,[70] the Court partly answered one of those questions. The Court held unconstitutional a Virginia statute imposing criminal sanctions for publication of the confidential proceedings of a state judicial review commission.[71] The Court said that the first amendment prohibited criminal punishment of nonparticipants in a confidential judicial proceeding for publishing truthful information regarding the proceedings.[72] However, once again, the Court insisted on limiting the holding, refusing to state broadly that truthful reporting about public officials in connection with their duties was insulated from criminal punishment by the first amendment[73] and leaving open the question of whether the media could ever be held liable. The Court did mention that the state's interest in protecting the reputation of its judges and integrity of its courts was not considered sufficient to justify criminal punishment for publication.[74] That balancing consideration foreshadowed the standard adopted in the next case.

3. Daily Mail

In *Smith v. Daily Mail Publishing Co.*,[75] a West Virginia newspaper article identified a juvenile murder suspect in violation of a statute that prohibited publication of the names of juvenile court defendants.[76] The newspaper learned about a shooting by monitoring a police band frequency and obtained the name of the suspect from witnesses, the police, and a local prosecutor.[77] In its decision, the Court expressly declined to follow its approach in *Cox*, indicating the source of the information was not a controlling factor.[78] Instead, the Court examined the state's justifications for its statutes[79] and introduced the strict scrutiny test,[80] stating that a state may place content-based restrictions on media publication only where they furthered a state interest of the highest order.[81] West Virginia's interests in protecting the confidentiality of juvenile offenders and improving their prospects for future employment were not deemed suffi-

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69. Following the *Cox* holding, the Court decided another private facts case that involved court proceedings in Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977). There, a trial judge chose not to close a juvenile court proceeding, as he was permitted by statute. After reporters attended, he attempted to enjoin them from printing the name or photograph of the 11-year-old defendant. The Supreme Court found his order unconstitutional, noting that once truthful information was publicly revealed, the court could not constitutionally restrain its dissemination. *Id.* at 309-11.

70. 435 U.S. 829 (1978).

71. *Id.* at 844-45.

72. *Id.* at 837-42.

73. *Id.* at 837-38.

74. *Id.* at 841.

75. 443 U.S. 97 (1979).

76. *Id.* at 99.

77. *Id.*

78. *Id.* at 103.

79. *Id.*

80. *Id.* at 102.

81. *Id.*

ciently substantial to justify blanket media restrictions on juvenile proceedings.[82]

The Court also introduced two other elements for use in the evaluation of state restrictions. First, the Court said a state cannot punish truthful information about a "matter of public significance,"[83] a standard similar to the newsworthiness test.[84] Second, absent a compelling state interest, a state cannot punish publication "if a newspaper lawfully obtains truthful information."[85] As before, the Court limited its holdings to the facts at hand and expressly refused to consider whether unlawfully obtaining information would negate this protection.[86]

4. Globe Newspaper

In *Globe Newspaper Co. v. Superior Court*,[87] a Massachusetts statute categorically excluded the public from trials of sexual offenses involving juvenile victims.[88] In holding the statute invalid, the Court used the strict scrutiny analysis and found compelling the state's interest in protecting minors from trauma and/or embarrassment and encouraging others to testify.[89] However, the Court determined that the mandatory closure rule was too broad a means of advancing those interests and suggested judicial discretion be applied on a case-by-case basis.[90]

5. *Summary of Factors*

From these cases, the relevant factors to be employed in determining whether a state may prohibit publication of truthful private facts appear to be:[91] (1) whether the information came from a public judicial record, although confidential judicial proceedings were not off limits and protection for other public records was left as an open question; (2) whether the information was obtained lawfully, although the cases refuse to address the issue of unlawfully obtained information and leave open the question of whether the media would be protected if a third party unlawfully obtained the information and lawfully presented it to the media;[92] (3) whether the information was newsworthy, al-

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82. *Id.* at 104. The Court suggested a case-by-case determination on whether restrictions were necessary.

83. *Id.* at 103.

84. *See supra* notes 36-38 and accompanying text.

85. *Daily Mail*, 443 U.S. at 103. This phrase, heavily relied on in the *Florida Star* case, was introduced with the qualifier that such a rule was suggested by prior cases. *Id.* In the dissent in the *Florida Star* case, Justice White strongly objects to the majority's reliance on the phrase as precedent. *Florida Star*, 109 S. Ct. at 2615 (White, J., dissenting). The case is generally considered to stand for that proposition, however.

86. *Daily Mail*, 443 U.S. at 105-06.

87. 457 U.S. 596 (1982).

88. *Id.* at 607-08.

89. *Id.* Ironically, in the *Florida Star* case, the Court rejected the state's interest in encouraging other victims of sexual attacks to come forward as insufficient. *Florida Star*, 109 S. Ct. at 2611.

90. *Globe Newspaper*, 457 U.S. at 607-08. *See* Note, *What Ever Happened to 'the Right to Know'?: Access to Government-Controlled Information Since* Richmond Newspapers, 73 VA. L. REV. 1111, 1118 (1987).

91. Kovner, *Recent Developments in Intrusion, Private Facts, False Light and Commercialization Claims*, in 3 COMM. L. INST. (PLI) 811 (1988).

92. *See, e.g.*, Pearson v. Dodd, 410 F.2d 701 (D.C. Cir. 1969).

though only *Daily Mail* recognized this defense; (4) whether such a prohibition would have a chilling effect, although this factor was emphasized only in *Cox*; and (5) whether the prohibition served a state interest of the highest order in the least restrictive means possible, the Court's nearly insurmountable hurdle of strict scrutiny.[93]

III. *FLORIDA STAR* AND ITS AFTERMATH

In the *Florida Star* case, the Court applied these relevant factors in a sometimes puzzling manner, solidified the media's protection against liability for publishing truthful private facts, and seemingly eliminated the private facts tort cause of action.

A. *Case Background*

The *Florida Star*, an 18,000-circulation newspaper in Jacksonville, Florida,[94] printed a regular feature called "Police Reports," which contained brief articles describing local criminal incidents under police investigation.[95] After B.J.F.[96] made her report to the Duval County Sheriff's Department, the department placed the report, which inadvertently included her full name, in the press room.[97] The room contained signs stating that the names of rape victims were not matters of public record and were not to be published.[98] The prohibition came from a state statute making it unlawful to print, publish, or broadcast in any instrument of mass communication the name of a victim of a sexual offense.[99] In addition to the statute's prohibition, the newspaper's internal policy forbade publication of a rape victim's name.[100] The newspaper's reporter-trainee, who wrote down the information from the police report, knew of the sign and the newspaper's policy when she copied B.J.F.'s full name.[101] The article appeared as one of 54 police blotter stories in that day's edition.[102]

B.J.F. filed suit against the Sheriff's Department and the *Florida Star*, but settled before trial with the Sheriff's Department for $2,500. The trial court[103]

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93. *Daily Mail*, 443 U.S. at 102. Justice Burger, writing for the majority, concedes that "state action to punish the publication of truthful information seldom can satisfy constitutional standards." *Id.*

94. *Florida Star*, 109 S. Ct. at 2605.

95. *Id.*

96. B.J.F. was substituted for the appellee's full name to preserve her privacy. *Id.* at 2605.

97. *Id.*

98. *Id.*, at 2616 (White, J., dissenting).

99. The statute reads: "Unlawful to publish or broadcast information identifying sexual offense victim. — No person shall print, publish, or broadcast, or cause or allow to be printed, published, or broadcast, in any instrument of mass communication the name, address, or other identifying fact or information of the victim of any sexual offense within this chapter." FLA. STAT. § 794.03 (1987).

100. *Florida Star*, 109 S. Ct. at 2606.

101. *Id.*

102. *Id.* The article read: "[B.J.F.] reported on Thursday, October 20, she was crossing Brentwood Park, which is in the 500 block of Golfair Boulevard, enroute to her bus stop, when an unknown black man ran up behind the lady and placed a knife to her neck and told her not to yell. The suspect then undressed the lady and had sexual intercourse with her before fleeing the scene with her 60 cents, Timex watch and gold necklace. Patrol efforts have been suspended concerning this incident because of lack of evidence." *Id.*

103. In a day-long trial, in the Circuit Court in Duval County, Florida, B.J.F. testified that she had suffered emotional distress from the publication of her name. She said that she heard about the article from fellow workers

held the newspaper per se negligent based on its violation of the statute[104] and specifically held the statute constitutional as reflecting a proper balance between the first amendment and privacy rights.[105]

B. *Holdings and Analysis*

In reversing the state courts,[106] the Supreme Court once again refused to address the basic validity of the private facts tort. As in *Cox*, the Court would not hold broadly that truthful publication may never be punished consistent with the first amendment[107] and would not answer the less sweeping question of whether truthful publication may ever be subjected to civil or criminal liability.[108] However, the Court noted that without exception it had upheld the press' right to publish when it conflicted with personal privacy rights.[109] While the Court emphasized that it resolved those conflicts and the *Florida Star* case only as each arose in a discrete factual context,[110] the media's winning streak remained intact.

The Court held that where a newspaper publishes truthful information that was lawfully obtained, punishment may be imposed only when narrowly tailored to further a state interest of the highest order.[111] The Court said that Florida's statute did not properly further a state interest for three reasons: (1) because the newspaper obtained the information lawfully, that is, the state made the information available through one of its own agencies, the state retained a less restrictive (and less constitutionally intrusive) way of safeguarding significant interests on which publication may impinge;[112] (2) the state imposed a broad negligence per se standard in which liability follows automatically from publication, instead of the common-law privacy action standard that disclosure had to be highly offensive to a reasonable person, as determined on a case-by-case ba-

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and acquaintances, that her mother had received several threatening phone calls from a man who said he would rape her daughter again, that B.J.F. had to change her phone number and residence, to seek police protection, and to obtain mental health counseling. The *Florida Star*, in defense, said the newspaper had learned B.J.F.'s name from the police report and inadvertently violated its internal rule against publishing the names of sexual offense victims. *Id.*

104. *Id.* The judge instructed the jury that it could award punitive damages to B.J.F. if it found the newspaper had acted with reckless indifference to the rights of others. The jury then awarded B.J.F. $75,000 in compensatory damages and $25,000 in punitive damages. *Id.*

105. *Id.*

106. When the newspaper appealed, the First District Court of Appeal affirmed the holding, 499 So. 2d 883 (1986), stating that a rape victim's name is of a private nature and not to be published as a matter of law. *Florida Star*, 109 S. Ct. at 2606. The Florida Supreme Court denied discretionary review. *Id.* at 2607.

107. *Id.*

108. *Id.* at 2609. The Court stated, "We continue to believe that the sensitivity and significance of the interests presented in clashes between First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case." *Id.*

109. *Id.*

110. *Id.* In other cases, the Court has held that the right of the press to publish truth overcame asserted interests other than personal privacy. *Id.* at 2608 n.6.

111. *Id.* at 2613.

112. *Id.* at 2611.

sis;[113] and (3) the statute was underinclusive because it proscribed publication in the mass media but not the spread of information by other means, such as "backyard gossip."[114] The Court's overarching concern, mentioned but not discussed, was the "public interest, secured by the Constitution, in the dissemination of truth."[115]

In evaluating the case, the Court maintained that *Cox* was not controlling because it involved courtroom records. The Court went on, however, to use a standard derived from *Cox* that public judicial records may not be restricted, saying its holding would be limited to information obtained from public records, "more specifically, from judicial records" maintained in connection with a public prosecution and open to the public.[116] Instead of *Cox*, the Court said it relied on the "lawfully obtained" standard from *Daily Mail*. Because the newspaper lawfully obtained the rape information, the paper could not be held liable.[117] As in *Globe Newspaper*, the Court blamed the government for failing to protect its interest in keeping the victim's name out of the public record and contended that the media should not be responsible for knowing whether the information contained in a public record is anything other than information available for publication.[118] However, in *Globe Newspaper*, a judge chose to release the government information. In the *Florida Star* case, the release was inadvertent.[119] As the Court suggested, a rule forcing the media to prune from public records anything that might be unlawful to publish would prove onerous.[120] However, using the Court's own aversion to broad holdings in private facts cases, it could be argued that in the particular facts of this case the media already knew the report contained information that was unlawful to publish. The "onerous burden" of knowing what information to prune from the public record consisted of reading the signs posted near the reports that said rape victims' names could not be used.

In this argument, as well as in several others, the Court displayed an extraordinary reluctance again to fetter the press by placing any burden on information-gathering from public records. The Court said that punishing the media for publishing already-public information would not advance state interests.[121] Appellee B.J.F. had argued that the statute furthered three closely related interests: the privacy of victims of sexual offenses; the physical safety of such victims, who may become targets of retaliation if their names are known to

113. *Id.* at 2612. Justice White said in dissent that the per se standard simply means the state legislature, reflecting the will of people, determined that publication is categorically offensive to a reasonable person. The determination is not for the court to make, he said. *Id.* at 2617 (White, J., dissenting).

114. *Id.* at 2612-13.

115. The Court relied on the common thread in these privacy cases, the concern for hampering the free flow of information. *Id.* at 2609 (quoting *Cox*, 420 U.S. at 491).

116. *Id.* at 2609.

117. *Id.* at 2609-10.

118. *Id.* at 2609. The government retains ample means of safeguarding significant interests upon which publication may impinge, including rape victim's anonymity, according to the Court. It stated, "[W]here information is entrusted to the government, a less drastic means than punishing truthful publication almost always exists for guarding against the dissemination of private facts." *Id.*

119. *Id.* at 2606.

120. *Id.* at 2610.

121. *Id.*

their assailants; and the goal of encouraging such victims to report the offenses without fear of exposure.[122] While the Court considered these interests "highly significant," it believed that, where information is entrusted to the government, a means less drastic than punishing truthful publication almost always exists.[123] That less drastic means would be to place responsibility on the government to safeguard privacy interests by restricting the contents of public records.[124] While not ideal from the media's perspective (favoring open access to government records), the Court's guideline at least removes the dispute from the privacy tort arena and places it where more solid doctrine exists.[125]

The Court applied one of its other *Daily Mail* standards and concluded that the newspaper article contained information of paramount public importance:[126] the commission and investigation of a violent crime that had been reported to authorities. The question in *Florida Star*, however, could be seen as not the newsworthiness of crime information but the newsworthiness of names within that information. How much does a name add to the level of newsworthiness? A significant amount, according to the media.[127] Yet, while the media generally consider names essential to newsworthiness,[128] they frequently debate the value of including names in certain crime reports, particularly rape reports.[129] Withholding certain victim names would not likely thwart the general

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122. *Id.* at 2611.

123. *Id.* at 2609. The Court said, "[I]t is highly anomalous to sanction persons other than the source of its release." *Id.* at 2610.

124. In the dissent, Justice White points out that the State of Florida took steps to accomplish just that. While the state was not asking the media to do its job, he said, the media should "respect simple standards of decency and refrain from publishing" when mistakes occur in compiling records. White's plea smacks more of wishful thinking than legal doctrine that could be used as a basis for promoting privacy interests over the first amendment. *Id.* at 2616 (White, J., dissenting).

125. Instead of post-publication liability, the issue becomes one of prior restraint, where the Supreme Court has found first amendment interests of a free press to outweigh governmental interests in restricting information. *See* New York Times Co. v. United States, 403 U.S. 713 (1971) (the Pentagon Papers case, where the Court held the government failed to meet its heavy burden of justifying its request to block publication of federal documents relating to the nation's involvement in the Vietnam war). *But see Supreme Court Won't Allow CNN to Air Tapes of Noriega Telephone Calls in Jail*, Wall St. J., Nov. 19, 1990, at B5, col. 5 (the Court, in a 7-2 decision rendered without explanation, refused to lift a gag order preventing Cable News Network from broadcasting tape recordings of jailhouse conversations made by prisoner and former Panamanian leader Manuel Noriega).

126. *Florida Star*, 109 S. Ct. at 2611.

127. Wolf, Thomason, & LaRocque, *The Right to Know vs. the Right of Privacy: Newspaper Identification of Crime Victims*, 64 JOURNALISM Q. 503, 503 (1987). In *Ross v. Midwest Communications*, Inc., 870 F.2d 271, *cert. denied*, 110 S. Ct. 326, the Fifth Circuit found a logical nexus between the rape victim's name and newsworthiness in a documentary questioning the guilt of a man convicted of rape. "Communicating that this particular victim was a real person with roots in the community, and showing [the television station's] knowledge of the details of the attack upon her, were of unique importance to the credibility and persuasive force of the story." *Id.* at 274. The court refused to hold that a rape victim's name is always a matter of public concern even if her rape is a matter of public concern. *Id.* at 275. *But see* Note, The Florida Star v. B.J.F.: *Balancing Freedom of the Press and the Right to Privacy upon Publication of a Rape Victim's Identity*, 35 S.D.L. REV. 94, 112 (1990) ("There are times, however, when free press values are little served by the reporting of the rape victim's identity.").

128. Linder, *supra* note 60, at 421-22.

129. *See, e.g.*, Wolf, Thomason & LaRocque, *supra* note 127, at 503; *Groups Urge Legislation to Protect Rape Victims' Names*, U.P.I., June 29, 1990 (Wire service BC cycle); Collins, *The Media's Secret*, Newsday, June 11, 1990, pt. II, at 4 (Nassau & Suffolk ed.); *Should We Reveal Her Name: The Press Still Protects the Central Park Jogger*, NEWSWEEK, April 2, 1990, at 48. *See also*, Katz, *supra* note 47, at 830 (discussing the public versus private figure dichotomy).

state interest in the dissemination of crime information,[130] but it would place a government restriction on the media that the Court would rather see implemented *through* the government rather than *against* the media.[131] The media, meanwhile, would prefer that any restrictions come from within.[132] Indeed, most publishers and broadcasters voluntarily refrain from using rape victims' names, a policy dictated at least in part by public sentiment.[133] For the media, the issue is not whether they should or even want to publish rape victims' names. The issue is who will hold the blue pencil over newspaper and broadcast stories, the media or the government. Where an unfettered press is still considered essential for the government to function as intended, the media need to keep as tight a grip as possible on the blue pencil.

In its final argument that the statute did not serve a state interest of the highest order, the Court labeled Florida's statute underinclusive and in doing so stepped into a morass. If the state attempts to punish dissemination of a rape victim's name, the Court said, the state should demonstrate its commitment to advancing that interest by applying the prohibition to the "smalltime disseminator as well as the media giant."[134] Such a statute would be unenforceable and unwarranted. Even with its erratic development, the private facts tort never placed liability for publishing information on individuals. The tort purposefully covered the mass media as the prime disseminators of information who could inflict more harm, or at least more widespread harm, than simple wagging tongues.[135] In addition, enforcement of such a statute would be impossible.[136]

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130. States frequently forbid the use of minors' names in criminal proceedings in juvenile courts, but those are defendant names rather than victim names. *See, e.g.*, Montesano v. Las Vegas Review Journal, 688 P.2d 1081 (1983), *cert. denied*, 466 U.S. 959 (1984) (record of juvenile offense confidential by statute, but fact that offense became public inadvertently in subsequent court proceedings precluded claim for violation of statute). In *Florida Star*, the Court relies on *Daily Mail* to compare restricting publication of a juvenile offender's name to a crime victim's name. Justice White vehemently disagreed, saying, "Surely the rights of those accused of crimes and those who are their victims must differ with respect to privacy concerns." *Florida Star*, 109 S. Ct. at 2615 (White, J., dissenting). *See* Note, *supra* note 127, at 111; Note, *supra* note 16, at 1096.

131. *See supra* notes 121-24 and accompanying text.

132. *See, e.g., Privacy and the Press*, Christian Sci. Mon., May 17, 1990 (Ideas Section), at 13.

133. *See* Wolf, Thomason & LaRocque, *supra* note 127, at 503. The authors note the media have become more sensitive to concerns of crime victims in recent years for several reasons. The reasons include the media's own credibility studies, which indicate the public believes the media often take advantage of ordinary people who are victims of circumstances; the 1982 President's Task Force on Victims of Crime, which recommended names and addresses of victims not be made public; and, increased public awareness of the victims' plight through support groups, and increased attention to the problem by the media themselves. *Id.* at 503-04. From their survey of newspapers nationwide, the authors concluded that 90% of those responding did not print names or addresses of rape victims. *Id.* at 505. The *Los Angeles Times* estimated that not more than 10 newspapers in the country publish rape victims' names. Japenga, *How a Paper's Explicit Rape Policy Affects a Town*, L.A. Times, July 18, 1989, pt. 5 (View Section) at 1, col. 2 (home ed.); Note, *supra* note 127, at 113.

134. *Florida Star*, 109 S. Ct. at 2613. The defendant 18,000-circulation newspaper in this case could hardly be classified as a media giant.

135. Zimmerman suggests that society never placed a premium on prohibiting gossip, that it serves a vital social role, and that the media only perform a gossip function no longer so extensive among individuals because of the growth of less intimate communities. Zimmerman, *supra* note 7, at 331-33.

In assessing the social bases of the privacy tort, commentator Robert Post concluded that the Restatement settled for a workable rule-of-thumb for liability, differentiating allowable private communications (to another person or small group) from actionable public communications (to so many persons that the matter is substantially certain to become public knowledge). Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957, 993, 995 (1989). He states: "We can interpret the publicity require-

C. *Aftermath of* Florida Star

The argument of underinclusiveness pinpoints again the difficulty in defining the private facts tort. If after a century it remains so poorly defined and oddly applied, what hope for its clarification and effective use remain? As three justices remarked in the *Florida Star* dissent, this case may put an end to the private facts tort.[137] Even though the Supreme Court will not explicitly rule out the tort, the Court seems unwilling to sanction its application.[138] In cases since *Florida Star*, the media's immunity to the private facts tort remains strong. Two cases involved inadvertent inclusion of nonpublic information in public records, facts similar to the *Florida Star* case, and both holdings favored the media.[139]

IV. CONCLUSION

In summary, the standards seem more muddled but the message grows increasingly clearer: The first amendment trumps the individual privacy concerns in the truthful publication of private facts. Where the media essentially determine whether they meet the standard of newsworthiness, where the state statute virtually never rises to the level of promoting a state interest of the highest order, where publication by the mass media cannot be proscribed without restricting the tongues of individual gossips, the possibility that a plaintiff will

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ment, then, as an attempt to ensure that public communications comply with minimum standards of civility, while liberating private communications from the threat of legal enforcement of such restraints." *Id.* at 992.

136. *Id.* The Court cited as precedent *Daily Mail*, in which it held that a statute was insufficiently tailored to the state's interest in protecting anonymity where it restricted only newspapers, not the electronic or other forms of publication, from identifying juvenile offenders. Finding a statute underinclusive because it does not cover different forms of mass communication cannot be considered analogous to inclusion of backyard gossips as instruments of communication. In his concurrence, Justice Scalia faults the statute for omitting backyard gossips, saying, "[T]his law has every appearance of a prohibition that society is prepared to impose upon the press but not upon itself." *Florida Star*, 109 S. Ct. at 2614 (Scalia, J., concurring). *See* Note, *supra* note 127, at 116.

137. *Florida Star*, 109 S. Ct. at 2618 (White, J., dissenting).

138. Justice White laments: "I doubt that there remain any 'private facts' which persons may assume will not be published in the newspapers or broadcast on television." *Id.* One commentator suggests that the Court's actions continue a legacy of fostering an irresponsible press. Note, The Florida Star v. B.J.F.: *Is Journalistic Irresponsibility Paramount to Individual Privacy?*, 16 OHIO N.U.L. REV. 93, 93 (1989).

139. Boettger v. Loverro, 521 Pa. 366, 555 A.2d 1234, *vacated*, Easton Publishing Co. v. Boettger, 110 S.Ct. 225 (1989), and Cape Publications, Inc. v. Hitchner, 549 So. 2d 1374 (Fla.), *appeal dismissed*, 110 S. Ct. 296 (1989). In *Boettger*, the Pennsylvania statute prohibited transcripts of conversations intercepted by wiretapping from being disclosed. 521 Pa. 366 at 370-71, 555 A.2d at 1236-37. In a preliminary hearing, however, a prosecutor inadvertently attached a transcript to a document filed with the court. A reporter obtained a copy of the transcript, and his newspaper published a version of the remarks. *Id.*, 555 A.2d at 1236-37. On appeal, the state supreme court upheld a civil liability award of $1,000 against the newspaper for its unlawful disclosure, concluding that individuals' rights to privacy outweighed the interest in public disclosure of such private telephone conversations. *Id.* at 370-74, 555 A.2d at 1236-40.

In *Cape Publications*, parents had filed suit against a newspaper and a reporter when the reporter lawfully obtained child abuse information in relation to a trial and the newspaper published the information. 549 So. 2d at 1374. The state supreme court relied on the strong public interest in judicial proceedings, citing *Cox*, *id.* at 1378, the fact that the information was lawfully obtained, citing *Florida Star*, *id.* at 1378-79, and the determination that the child abuse cases are newsworthy or of legitimate public concern, citing *Landmark Communications*, *id.* at 1378. After holding on these grounds, the state court expressly did not reach the constitutionality of the statutes that maintain the confidentiality of child welfare records. Because the government provided the information, however inadvertently, it was held legitimately within public domain and thus available to the media. *Id.* at 1378-79.

prevail appears nonexistent. To lament the passing of the private facts tort seems pointless.[140] It lacks usefulness as a protection of individuals or a check on the media. However, to encourage some other prohibition on publication of rape victims' names or any other kind of media check because of anger at some publishers or broadcasters seems overly reactive and perhaps even dangerous.[141] While distaste for certain actions of the media could not be considered novel today,[142] the development of media power can.[143] The primary reason is television, whose instantaneous nature and intrusive presence helped fuel the growth in complaints from the public over media fairness.[144] The refrain, "Why do they hate us," arises throughout the industry.[145] Those fears may provide the force that restrains the industry and helps eliminate the complaints.

Even if such internal controls fail to make an immediate impact on the media, external restrictions imposed by the courts and legislature should be avoided. The media's role as information conduit remains vital, and, while the concern that any restriction will lead to more restrictions and the erosion of media effectiveness in their role may seem like a worn rallying cry of journalists to some, the concern remains valid.[146] In the *Florida Star* case, Justice White laments that, in balancing first amendment and privacy concerns, "we hit the bottom of the slippery slope."[147] Perhaps, but climbing back up for the sake of a confusing tort seems to hold little purpose and devising methods to prohibit communication seems only to create more troubles.

Lorelei Van Wey

140. "The news and information media have been saddled with this nuisance of a communicative tort for too long." Zuckman, *supra* note 12, at 265.

141. *Cf.* Note, *supra* note 16, at 1096 (state should be able to regulate disclosure of a rape victim's name), and Leading Cases, *Constitutional Law*, 103 HARV. L. REV. 259, 260 (1989) ("the Court has facilitated news-gathering at the expense of news subjects'—and, ultimately, the public's—best interests").

142. Warren and Brandeis found the press intrusive in 1890. Warren & Brandeis, *supra* note 24, at 195-96. *See* Patterson, *It's the Plaintiff's First Amendment Too*, NIEMAN REP., Winter 1988, at 4 (today "[s]ome see a malevolent press out to wreck American institutions and destroy a decent measure of privacy for individuals; the press generally sees itself as an embattled and unappreciated servant of the public trying to hold misleaders to account and to slice through their baloney.")

143. Clurman, *A Very Cold Winter*, NIEMAN REP., Winter 1988, at 8 ("[t]he modern news media were born in the '50s, revealed their strength in the '60s, asserted it in the '70s and were hammered for it in the '80s").

144. *Id.* at 8, 10, 13. *See* Clurman, *Afterthoughts*, NIEMAN REP., Autumn 1989, at 36.

145. Clurman, *supra* note 143, at 11-12.

146. Patterson, *supra* note 142, at 34.

147. *Florida Star*, 109 S. Ct. at 2619 (White, J., dissenting).